BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTIE R. COLEMAN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,007,851
ARMOUR SWIFT ECKRICH	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appeals the August 24, 2004 Award of Administrative Law Judge Bryce D. Benedict. Claimant was denied benefits after the Administrative Law Judge (ALJ) determined that claimant's injury did not arise out of and in the course of her employment, as it was the result of horseplay. Claimant argues that she was a non-willing participant in the horseplay and should, therefore, be compensated for her injuries.

Respondent argues that horseplay is not compensable in Kansas, regardless of claimant's participation or lack thereof. The Appeals Board (Board) heard oral argument on February 1, 2005.

APPEARANCES

Claimant appeared by her attorney, Jeff K. Cooper of Topeka, Kansas. Respondent, a self-insured, appeared by its attorney, Mark E. Kolich of Lenexa, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

The issue before the Board is whether claimant's accidental injury arose out of and in the course of her employment or whether claimant is to be denied benefits, as the injury stemmed from horseplay.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge denying claimant benefits should be affirmed.

Claimant, an employee of respondent, was waiting in a meeting room for a required meeting, when, on the date of accident, she was summarily dumped from a chair onto the floor. The person who dumped her out of the chair, Allen Birdsell, was a co-employee with whom claimant had had occasional contact. However, there was no animosity or any prior problems between claimant and Mr. Birdsell. Claimant suffered accidental injury to her low back and was transported to the hospital by ambulance. She continues to work for respondent, but wears a prescribed TENS unit to help her with ongoing low back problems.

Claimant acknowledged that she and Mr. Birdsell had had no arguments or prior disputes and that there was no warning that Mr. Birdsell was going to dump her from the chair. There is also no indication in the record that Mr. Birdsell has a history of horseplay or that respondent knew or should have known that Mr. Birdsell indulged in dangerous play while in his employment with respondent.

The general rule in Kansas is that injuries incurred during horseplay do not arise out of the employment and are not compensable unless it is shown that the horseplay has become a regular incident of the employment. The Kansas Supreme Court has held that a participant in horseplay may recover compensation for his or her injuries where the horseplay has become a regular incident of employment.[1] The Board, in its decision in *Rogers*,[2] noted that Kansas case law does not include any cases where an injury to a nonparticipating employee was found compensable solely on the grounds that he or she did not participate in the horseplay. Several older decisions expressly state injury from horseplay, even to a nonparticipating employee, will not be compensable unless the employer is aware of a habit of such activity.[3] That rule has been restated with approval

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[1] *Thomas v. Manufacturing Co.*, 104 Kan. 432, 179 Pac. 372 (1919); *Carter v. Alpha Kappa Lambda Fraternity*, 197 Kan. 374, 417 P.2d 137 (1966).

[2] *Rogers v. Big Lakes Development Center, Inc.*, No. 247,715, 2000 WL 235562 (Kan. WCAB Feb. 16, 2000).

[3] *Stuart v. Kansas City*, 102 Kan. 307, 171 Pac. 913 (1918); *Neal v. Boeing Airplane Co.*, 161 Kan. 322, 167 P.2d 643 (1946).

as recently as 1995 in *Harris*.[4] Although the Board acknowledges that decision involved an assault in anger, the court restated the general rule that:

> [I]f an employee is assaulted by a fellow workman, **whether or in anger or in play**, an injury so sustained does not arise "out of employment" . . . unless the employer had reason to anticipate that injury would result if the two continued to work together. (Emphasis added).[5]

The Kansas Supreme Court has created an exception for an assault arising from a dispute over the conditions or incidents of employment.[6] However, there was no indication that Mr. Birdsell's actions in this matter were related to the employment, nor were they criminally motivated, justifying a finding of an assault. The evidence in this matter indicates that this was merely a foolish act of horseplay.

> An employee is not entitled to compensation for an injury which was the result of sportive acts of coemployees, or horseplay or skylarking, whether it is instigated by the employee, or whether the employee takes no part in it.[7]

The Board acknowledges the ALJ's analysis of the law governing horseplay in Kansas has become the minority view among the states, where an employee is not a willing participant in the horseplay activities. However, the Board is bound to follow Kansas law, absent some indication that the appellate court is departing from that precedent.[8]

Based upon the above analysis, the Board finds that the Award of the ALJ denying claimant benefits for the injuries suffered on November 6, 2001, should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated August 24, 2004, should be affirmed in all respects, and claimant, Christie R. Coleman, is denied an award of benefits

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[4] *Harris v. Bethany Medical Center*, 21 Kan. App. 804, 909 P.2d 657 (1995).

[5] *Harris* at 810, *citing Hallett v. McDowell & Sons*, 186 Kan. 813, 817, 352 P.2d 946 (1960).

[6] *Brannum v. Spring Lakes Country Club, Inc.*, 203 Kan. 658, 455 P.2d 546 (1969).

[7] *Stuart* at 310.

[8] *State v. Jones*, 24 Kan. App. 2d 669, 951 P.2d 1302 (1998).

against the respondent, Armour Swift Eckrich, as a result of the incident of November 6, 2001.

IT IS SO ORDERED.

Dated this ____ day of March 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

We disagree with the majority's holding. There is no valid reason to deny benefits to workers who are diligently performing their job duties when they are unexpectedly injured by a co-worker's horseplay. There is little question that an accident is compensable when workers are injured by a loose or broken part flying from the machine they are operating. The same should hold true when they are injured by horseplay in which they were not participating. Because of their jobs, workers are placed in close proximity of others for extended periods. And it is neither unexpected nor surprising that co-workers would occasionally engage in sportive acts. Accordingly, horseplay is a risk of employment.

According to *Larson's*,[9] it is well-established that a non-participating victim of horseplay may recover workers compensation benefits.

> It is now clearly established that the non-participating victim of horseplay may recover compensation. The modern observer may find it hard to believe that such claims were uniformly denied in early compensation law; this can only be understood by reconstructing the narrow conception of industrial injury which colored all early interpretations of the Act. Aberrations in machines could qualify as

[9] *Larson's Workers' Compensation Law*.

accidents, but aberrations in fellow-employees could not. Just as malicious assaults by co-employees were ruled out as intentional and personal, so sportive assaults were treated as something foreign to the inherent risks of the employment.

Mr. Justice Cardozo's opinion in the *Leonbruno* case is generally credited with having ushered in the modern rule. He pointed out the inconsistency between the line of English cases which had set the pattern of denials in horseplay cases and the later House of Lords Decision in *Thom v. Sinclair*, which had developed the idea that an injury was compensable if it occurred because the employment brought the employee within a "zone of danger." It was but an easy step from this to a demonstration that the employment environment, including as it must the natural tendency of normal people to indulge in occasional foolery, was for this claimant made a zone of danger by the acts of the co-employees.

> Whatever men and boys will do, when gathered together in such surroundings, at all events if it is something reasonably to be expected, was one of the perils of his service . . . The claimant was injured, not merely while he was in a factory, but because he was in the factory, in touch with associations and conditions inseparable from factory life. The risks of such associations and conditions were risks of the employment.[10]

We believe claimant's accident is compensable under the Workers Compensation Act and, therefore, we would reverse the August 24, 2004 Award that denied benefits.

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[10] 2 *Larson's Workers' Compensation Law* § 23.02 at 23-2 to 23-3 (2004) (footnotes omitted).